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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANIL SAGAR,

Defendant and Appellant.

A150155

(San Mateo County
Super. Ct. No. 16NF007106)

Anil Sagar appealed from a judgment of conviction and sentence entered after a jury found him guilty of assault with a deadly weapon. He contended a sentence enhancement imposed for a prior prison term (Pen. Code, § 667.5, subd. (b)) must be stricken, because an enhancement was also imposed for a serious felony (§ 667, subd. (a)(1)).¹ We affirmed the judgment because the trial court had stayed the section 667.5 enhancement. The California Supreme Court has directed us to reconsider the matter in light of the advent of Senate Bill 1393, which amends section 667 and section 1385 such that a trial court has discretion to strike a prior serious felony conviction under section 1385. We therefore vacate our earlier decision and, having considered the parties' supplemental briefing, remand the matter to the trial court to decide whether to strike Sagar's prior serious felony conviction. We affirm the judgment in all other respects.

¹ All statutory references are to the Penal Code.

I. FACTS AND PROCEDURAL HISTORY

An amended information alleged that Sagar committed a felony assault with a deadly weapon (§ 245, subd. (a)(1)) and that he had a prior serious felony conviction (§ 667, subd. (a)(1)), a prior strike conviction (§§ 667, subd. (d); 1170.12, subd. (b)), and a prior prison term within the meaning of section 667.5, subdivision (b).

A jury convicted Sagar of assault with a deadly weapon. Sagar waived his right to a jury trial on the enhancements, and the court found the enhancement allegations true. The court sentenced Sagar to an aggregate term of 11 years in state prison, as follows: the three-year middle term for assault with a deadly weapon, doubled because of his prior strike conviction pursuant to section 1170.12, subdivision (c)(1); plus a consecutive five years for his prior serious felony conviction (§ 667, subd. (a)(1)). The court also imposed but stayed a one-year sentence for his prior prison term (§ 667.5, subd. (b)). Credits, fines, and fees were ordered as well. This appeal followed.

On August 31, 2018, we issued an opinion affirming the judgment of conviction and sentence.

On September 30, 2018, the Governor signed into law Senate Bill No. 1393 (Stats. 2018, ch. 1013), effective January 1, 2019, which amends sections 667 and 1385 to give the trial court discretion to strike a serious felony enhancement. This option was not available at the time of Sagar's sentencing.

On October 5, 2018, Sagar filed a petition in the California Supreme Court for review, asserting that Senate Bill 1393 applied to Sagar's matter and compelled remand to the trial court to decide whether to dismiss his section 667, subdivision (a) enhancement in the furtherance of justice.

On November 14, 2018, the California Supreme Court granted Sagar's petition and transferred the matter to this court, "with directions to vacate its decision and reconsider the cause in light of Senate Bill No. 1393 (Stats. 2018, Ch. 1013). (Cal. Rules of Court, rule 8.528(d).)" The parties each submitted supplemental briefing. (Cal. Rules of Court, rule 8.200(b)(1).)

II. DISCUSSION

A. Enhancement Under Section 667.5, Subdivision (b)

In his original opening brief, Sagar urged that the one-year prior prison term enhancement under section 667.5, subdivision (b) must be stricken, in light of the five-year serious felony enhancement imposed under section 667, subdivision (a)(1). We disagree.

It is true that a defendant cannot incur sentence enhancements under both section 667, subdivision (a)(1) and section 667.5, subdivision (b) based on the same prior conviction with a prison term: only the longer enhancement applies. (*People v. Jones* (1993) 5 Cal.4th 1142, 1150 [“the most reasonable reading of subdivision (b) of section 667 is that when multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply”].)

When a trial court has imposed both enhancements, some appellate courts have stricken the shorter of the two. (See *People v. Johnson* (2002) 96 Cal.App.4th 188, 209, disapproved on other grounds by *People v. Acosta* (2002) 29 Cal.4th 105, 134, fn. 13; *People v. Perez* (2011) 195 Cal.App.4th 801, 805.)

As this court previously determined, however, where a section 667.5, subdivision (b) enhancement has been found true, the trial court cannot strike it merely because there is a limitation on the imposition of multiple enhancements. (*People v. Brewer* (2014) 225 Cal.App.4th 98, 104 (*Brewer*) [where three-year enhancement under § 667.5, subd. (a) is imposed, one-year enhancement under § 667.5, subd. (b) must be stayed].) After all, rule 4.447(a) of the California Rules of Court provides: “A court *may not* strike or dismiss an enhancement solely because imposition of the term is prohibited by law or exceeds limitations on the imposition of multiple enhancements. Instead, the court must [¶] . . . [i]mpose a sentence for the aggregate term of imprisonment computed without reference to those prohibitions or limitations; and [¶] . . . [s]tay execution of the part of the term that is prohibited or exceeds the applicable limitation.” (Italics added.) This approach avoids a violation of the prohibition against multiple enhancements while

preserving the possibility of imposing the stayed term if the section 667, subdivision (a)(1) enhancement is later reversed. (See *Brewer, supra*, 225 Cal.App.4th at pp. 104–105; *People v. Walker* (2006) 139 Cal.App.4th 782, 794 fn. 9; *People v. Lopez* (2004) 119 Cal.App.4th 355, 364–365.)²

Here, the trial court imposed the five-year enhancement pursuant to section 667, subdivision (a)(1) and imposed but stayed the one-year enhancement for Sagar’s prison prior under section 667.5, subdivision (b)). The court complied with *Brewer*.

In his reply brief, Sagar says that *Brewer* was wrong because the cases on which it relied involved different issues. He fails to persuade us that *Brewer* is incorrect or that the stayed enhancement must be stricken.

B. Senate Bill 1393

In their supplemental briefing, the parties agree that Senate Bill 1393 applies retroactively to Sagar assuming the legislation goes into effect before Sagar’s judgment becomes final. Sagar urges that there is no way the judgment against him becomes final before January 1, 2019, and respondent does not argue otherwise.

The only dispute between the parties, therefore, is whether remand is necessary in light of the record. Sagar argues that *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081, suggests that remand is required regardless of anything the trial court said at the original sentencing, because the sentencing court was not at that time aware of the full scope of its discretion. Both Sagar and respondent cite other decisions holding (in the context of Senate Bill 620) that remand is required “unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement.” (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) Applying *McDaniels* here, the question is whether the trial court

² In *Jones*, our Supreme Court ordered the trial court to strike the excess imposed enhancement, but in that case the trial court had not *stayed* the enhancement. *Jones* did not address rule 4.447, or whether the trial court should, in the first instance, stay rather than strike the enhancement it finds true. (*Jones, supra*, 5 Cal.4th at p. 1153; see *Lopez, supra*, 119 Cal.App.4th at p. 364.)

clearly indicated it would not have stricken Sagar's prior strike if it had discretion to do so under section 1385.

Senate Bill 1393 requires dismissal of an enhancement "in furtherance of justice." (§ 1385, subd. (a).) Similarly, motions to dismiss a prior strike under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 involve the "furtherance of justice" standard. (*Id.* at p. 530.) Respondent advises that the trial court had denied Sagar's *Romero* motion to dismiss his prior strike, noting that the strike was recent and similar to the present offense, and Sagar's 2009 stabbing of his brother resulted in life-threatening injuries. The court also found Sagar's present offense "mind boggling" and expressed concern about "the protection of the public." Respondent urges that the court's comments clearly indicate it would not have dismissed the prior serious felony enhancement based on the circumstances of the crime and Sagar's recidivism and dangerousness.

Upon full consideration, we conclude that justice will best be assured if the trial court has an opportunity to decide whether to exercise its discretion to strike Sagar's prior serious felony conviction in light of Senate Bill 1393's amendments to sections 667 and 1385. We will remand for that purpose.

III. DISPOSITION

Our decision of August 31, 2018 is vacated. The matter is remanded for the trial court to consider whether to exercise its discretion to strike appellant's prior serious felony conviction for purposes of Penal Code sections 667 and 1385, as those sections have been amended by Senate Bill 1393. If the trial court strikes appellant's prior serious felony conviction, it shall resentence appellant. In all other respects, the judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P.J.

BRUINIERS, J. *

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution

(A148073)